BROWN & ROOT (LABUAN) SDN. BHD.

v.

PADA SDN. BHD.

SUPREME COURT, KOTA KINABALU
LEE HUN HOE CJ (BORNEO)
WAN SULEIMAN SCJ
GEORGE SEAH SCJ
[CIVIL APPEAL NO. 354 OF 1985]
1 OCTOBER 1986

CONTRACT: *Agreement of sale of 6 bungalows - Agreement subject to its not being frustrated by the acts of the State or Federal Government - Agreement frustrated following acquisition of the property by the Federal Government - Suit for return of money received as per terms of agreement - Whether unjust enrichment or constructive trust.*

Following an agreement of sale entered into between the appellants and the respondents for the sale of a certain landed property with 6 bungalows thereon, the respondents paid part of the total consideration stipulated and the appellants gave vacant possession of the property as agreed to.

The agreement however was subject to its not being frustrated by acts of the State of the Federal Government. Eventually, the agreement became impossible of performance following acquisition of the property by the Federal Government for the Labuan Airport Runway Extension.

The respondents sued the appellants for the return of the money received as per the terms of the agreement. The claim was resisted by the appellants who claimed a set-off against the respondents by adjusting the rentals received by the latter in the interrugnum. The counterclaim was rejected and the learned Judge entered judgment for the respondents. Hence this appeal.

Held:

[1] The appellants abandoned their plea on constructive trust in view of *Lee Pek Choo v. Ang Guan Yau* [1975] 2 MLJ 146. Although this was a Sarawak case the law in Sabah is the same as in Sarawak as regards the applicability of the Statute of Frauds.

[2] As long as the terms of an agreement are duly complied with, there can be no claim or complaint against any unjust enrichment through benefits flowing from acts extraneous to the agreement.

[3] In the absence of proper pleading with material particulars neither any issue could be raised nor any relief granted on such claims.

[Appeal dismissed with costs.]

Case referred to:
Lee Pek Choo v. Ang Guan Yau [1975] 2 MLJ 146

Legislation referred to:
Civil Law Act 1956, s. 15
Land Acquisition Ordinance (Cap. 69)(Sabah), s. 4
Rules of the High Court 1980, O. 14, O. 18 r. 19

For the appellants - Richard Barnes; M/s. Shelley Yap Leong Tseu Chong Chia & Co.
For the respondents - Joseph Ambrose Lee; M/s. Lee & Co.

JUDGMENT

Lee Hun Hoe CJ (Borneo):

The appellants appealed against the decision of the learned Judge in that he considered the equitable principles of unjust enrichment and constructive trust to be irrelevant. In the course of argument we referred appellants to the case of *Lee Pek Choo v. Ang Guan Yau* [1975] 2 MLJ 146. Although this is a Sarawak case the law in Sabah is the same as in Sarawak as regards the applicability of the Statute of Frauds. Accordingly, the appellants abandoned their ground on constructive trust.

For the purpose of this appeal the facts may be set out briefly. Appellants and respondents are both limited companies. Appellants own a piece of land on which are six units of bungalows. On 3 February 1983 they entered into an agreement whereby the respondents agreed to buy and the appellants to sell the property. Payment was to be made in two lump sums. The first payment of RM190,000 was to be made on the date of execution and the balance on or before 31 November 1983. Clause 4 of the agreement provides that vacant possession of the six bungalows was to be delivered to the respondents on the execution of the Memorandum of Transfer on 31 November 1983. It is not in dispute that RM190,000 was made by the respondents on the execution of the agreement and that the appellants gave vacant possession of the six bungalows to the respondents before the execution of the Memorandum of Transfer. One of the important terms of the agreement is Clause 8(a) which provides that in the event of the agreement becoming impossible of performance due to acts of either the State or the Federal Government not within the control of either the appellants or the respondents, then the appellants shall, on demand by the respondents, refund all monies received under the agreement. One month after the execution of the agreement the State Government indicated its intention to acquire the said land together with the six bungalows for the Labuan Airport Runway Extension *vide* Gazette Notification No. 82 dated 20 January 1983 under s. 4 of the Land Acquisition (Cap. 69) Ordinance. The State Government confirmed the acquisition *vide* Gazette Notification No. 155 dated 3 March 1983 under s. 5 of the said Ordinance. On 7 January 1983 the respondents gave notice to the appellants of revocation of the agreement and requested for the refund of RM190,000. The appellants refused to do so and the respondents sued the appellants. In their defence the appellants admitted the respondents' claim but alleged that this was subject to a set-off against rentals received by the respondents. By para. 6 of their counterclaim the appellants alleged that the respondents leased the six bungalows to E.D. Zublin A.G. and that therefore the rentals received "represented monies collected by the plaintiffs to the account of the defendants and that the plaintiffs held such monies in trust for the defendants".

The respondents allowed Sacon Construction Sdn. Bhd. the use of the six bungalows without payment of rent. The latter entered into an arrangement with E.D. Zublin A.G. for the use of the six bungalows.

The respondents took out two summonses, one under O. 18 r. 19 of the Rules of the High Court 1980, to strike out the counterclaim and the other under O. 14 for summary judgment. During the hearing of the first summons the parties agreed that the only issue before the Court was whether the appellants were entitled to the alleged rentals for the six bungalows.

It was contended that the respondents, in obtaining possession of the six bungalows, received a valuable benefit. It is the contention of the appellants that since the full purchase price has not been paid the appellants remain the legal owner of the property and all profits from the property rightly belong to the appellants. Although the agreement was silent on this,

the appellants argued that under s. 15 of the Civil Law Act 1956 the respondents were accountable to the appellants for the benefit arising out of the renting of the six bungalows. Hence, on the principles of unjust enrichment the parties should be placed in the same position as if the agreement had not been frustrated. The appellants alleged that the respondents rented the six bungalows through Sacon Construction Sdn. Bhd.

In answer the respondents maintained that s. 15 of the Civil Law Act 1956 did not apply and that the principles of unjust enrichment as claimed by the appellants could not succeed. First, the terms of the agreement, particularly Clause 8(a), are clear in that only monies received under the agreement are to be refunded. Secondly, the respondents did not enter into any arrangement with E.D. Zublin A.G. in respect of the six bungalows. Thirdly, Sacon Construction Sdn. Bhd. is a separate entity even though one director is also the director of respondents. On the particular facts, the learned Judge quite rightly refused to hold that there was a *nexus* between Sacon Construction Sdn. Bhd. and the respondents to justify the Court in lifting the corporate veil. As long as the respondents comply with the terms of the agreement the appellants could not complain against the respondents for the use of the property.

Having heard the parties the learned Judge granted the respondents' application and ordered the appellants' counterclaim to be struck out. The Court entered judgment for the respondents in the sum of RM190,000 with interest at 8% per annum from date of judgment to date of realisation and costs. The learned Judge stated at p. 17 of the appeal record:

> ... Apart from interpreting what was within the four corners of the agreement to the Court's mind what was more fair than that the respondents be refunded their money exclusive of any interest from the date of agreement (being interest not also provided for under the agreement) and the *quid pro quo* for it. Appellants had the free use of the respondents' money during that period while the respondents had use of the six bungalows during the same period and up to this judgment. All the claim about the respondents' having to account to the appellants for having received rents or not having received it the Court dismissed as being irrelevant as not having been provided for under the agreement ...

Although the question of unjust enrichment was argued in the Court below and here, a careful perusal of the pleadings did not show that this was properly pleaded. No objection was taken by the respondents on this as the respondents' Counsel referred to unjust enrichment in his affidavit. If we had been fully aware at the outset of all the circumstances we would not have allowed the appellants to raise the issue after abandoning the ground of constructive trust. It was after the hearing and preparing our judgment that we looked carefully at the pleadings that we realised how scanty, through no fault of the appellants, were the materials on which such an issue could be raised. Nevertheless, we do not think the learned Judge had come to the wrong conclusion when he stated that unjust enrichment was irrelevant in the light of the facts of the case.

Out of respect to the parties we decided to deal with their submissions. However, we decided not to go further into the meaning of unjust enrichment as a principle of liability as the appellants' claim however phrased must fail in this case.

We would dismiss the appeal with costs to the respondents. The deposit to the respondents on account of taxed costs.

Also found at [1987] 1 CLJ 229